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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.H., Defendant and Appellant.	A145521 (Solano County Super. Ct. No. J40106)

INTRODUCTION

This appeal is from the juvenile court's order committing 19-year old ward D.H. to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), also known as the Division of Juvenile Facilities (DJF), for a maximum term of five years. At the time of his commitment to DJJ, appellant had been before the juvenile court in Solano County on 10 separate occasions involving claims he had violated probation. At least three of the incidents caused appellant to be excluded from programs dealing with sex offender rehabilitation treatment at different non-DJJ facilities. The 2009 offense which renders D.H. eligible for a DJJ commitment, a violation of Penal Code section 288, subdivision (a), was not a DJJ-eligible offense at the time of its commission.

It became a DJJ-eligible offense with the 2012 amendment of Welfare and Institutions Code section 731, subdivision (a)(4) (section 731(a)(4).)[1]

We observe at the outset that counsel for appellant has raised a plethora of challenges here. At oral argument, however, she addressed certain issues in particular—the commitment to DJJ, the retroactivity of the changes to section 731(a)(4), and, if retroactive, whether the change violates the ex post facto clause. While we will address all the issues raised, we will focus at the outset on these three contentions. In the end, we conclude the credits for time served must be corrected and clerical errors in three juvenile detention disposition reports need to be changed. In all other respects we affirm the judgment.

COMBINED STATEMENT OF THE CASE AND FACTS

The Wardship Petition

In the summer of 2009, appellant, then 12 years old, molested his eight-year-old half brother. The younger child disclosed the molestation to their mother nine months later.[2] In April 2010, the Solano County District Attorney initially filed a wardship petition (§ 602) alleging one count of forcible sodomy, but later amended the petition to add one count of lewd act on a child (Pen. Code, § 288, subd. (a).) Following a contested jurisdictional hearing in September 2010, the court sustained the petition on the lewd act count but not the sodomy count.[3]

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[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

[2] The testimony supporting the petition is summarized in this court's unpublished opinion in appellant's prior appeal, *In re D.H.* (Nov. 30, 2011, A130577) [nonpub. opn.] review den. Feb. 22, 2012, S199303), which affirmed the juvenile court's jurisdictional and dispositional orders.

[3] The juvenile court concluded: "Looking at what his brother described and the circumstances of the actual act, I do find a reasonable doubt as to Count 1. The circumstances of that particular offense are such that I do not believe the events that occurred between the two brothers that night was an actual act of forcible sodomy. [¶] I

Defense-retained psychologist Kenneth Parker evaluated D.H. in June 2010. He administered a number of tests, including the Juvenile Sex Offender Protocol-II (J-SOAP-II), a sex offender assessment tool for estimating the probability of sexual reoffense by juveniles using static and dynamic scales. D.H. scored 11 out of 56, "well below the score of 21 referred to in the [J-SOAP-II] manual of subjects that did not reoffend." D.H. was reevaluated in September 2010 by court-appointed psychologist Kimberly Smith. She opined that D.H. "currently presents a low-moderate risk for sexual reoffense." She recommended that D.H. "receive structured adolescent sex offender treatment on an outpatient basis."

The probation officer's dispositional report referenced Dr. Smith's risk assessment and recommendation as well as a nonvalidated Juvenile Assessment and Intervention System (JAIS) assessment, which indicated D.J. fell "within the Selective Intervention (SI) category as he is at moderate risk to reoffend." This apparently occurred on September 21, 2010.

At the dispositional hearing on October 21, 2010, the court adjudged D.H. a ward of the court and placed him on probation in his mother's home. The court also referred D.H. to the sex offender intensive supervision unit.[4] Maximum confinement time was set at eight years. As noted, this court affirmed the trial court's orders on appeal.

The Probation Violations

Over the next four years, the probation department filed 10 probation violation petitions against D.H. (§ 777.) D.H. admitted all of them. Most of the alleged

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believe it was an actual act of [D.H.] engaged in sexualized behavior with his brother with an intention to gratify his own sexualized needs on that occasion, . . . and therefore find beyond a reasonable doubt that Count 2, as alleged, a violation of Penal Code Section 288[, subdivision] (a), has been proven."

[4] It appears that sex offender treatment under the auspices of this unit was to be provided on an outpatient basis and paid for by D.H.'s parents. When D.H.'s parents were unable to pay for treatment, it was terminated. D.H. was eventually placed in a group home that provided in-house sex offender treatment.

misconduct involved use of marijuana, disobedience to staff orders, disruptive behavior, bad language and subsequent failure in different placements. Only one allegation involved sexually provocative misconduct. No new criminal offenses were alleged.

First Probation Violation

In December 2010, defendant admitted he violated his probation by smoking marijuana. The probation officer's supplemental report stated a reassessment of D.H.'s risk of reoffense with the JAIS tool continued to show moderate risk. The results of a Juvenile Sexual Offense Recidivism Risk Assessment Tool-II (JSORRAT-II), completed on December 28, 2010, indicated D.H. was at *low*-moderate risk for future sexual reoffense. However, the probation department recommended the addition of outpatient substance abuse treatment, as well as return to outpatient sex offender treatment with Dr. Yasaie of Therapy Associates of Solano County (TASC). The court continued D.H.'s wardship with probation in his mother's home.

Second Probation Violation; First Out-of-Home Placement

In February 2011, D.H. admitted he violated his probation by submitting a positive drug test for hydrocodone (a half tablet of Vicodin supplied by D.H.'s mother) and failing to maintain acceptable grades in school. Also in February 2011, D.H. was terminated from TASC because his parents were unable to pay for treatment. The probation officer reported on February 28 that D.H.'s JAIS output report indicated moderate risk of reoffense. The probation officer recommended placement in New Foundations for four months to deal with appellant's escalating drug abuse, a slow transition back into mother's custody by way of furloughs, and deferral of outpatient treatment for his sex offender treatment until his return home. The court continued the wardship. D.H. was placed at New Foundations on March 11, 2011.

Third Probation Violation; Second Out-of-Home Placement

D.H. was terminated from New Foundations after two months, on May 27, 2011. Allegations included continuous misbehavior, including gang-related tagging, disrupting

class, and disrespecting staff. Most notably, at one meal he played with a hot dog in "a sexually suggestive manner." Appellant admitted he violated his probation by failing to complete New Foundations.

Court-appointed psychologist Kathleen O'Meara filed a psychological evaluation in early September 2011. Her report noted D.H.'s well-documented history of ADHD, depression, and substance abuse. However, testing conducted by her did not detect tendencies toward sexual deviation. Dr. O'Meara considered D.H. a "disturbed youngster acting-out unresolved familial issues" in need of " 'whole person' treatment"; she recommended placement in the Rite of Passage program. The probation officer's supplemental report from late September 2011 noted D.H. scored "as a high risk on NCCD. Therefore, a JAIS was required and completed." The probation officer admitted that the "JAIS is not a validated sex offender assessment tool; however, it is indicative of risk for *continued delinquency*." (Italics added.) The report reminded the court that when D.H. was first screened with this tool, he was identified as a moderate risk for sexual reoffense, but reassessment on September 23, 2011, had *downgraded* his risk level to *low*. "His principal service needs are substance abuse, mental health, and family dynamics" although he also "continues to need sex offender therapy to address his perpetrating and victim issues." Probation recommended continuation as a ward with a general placement order.

In October 2011, the court placed D.H. at the Children's Home of Stockton, which has a juvenile sex offender program.

Fourth Probation Violation; Third Out-of-Home Placement

On March 23, 2012, D.H. admitted a probation violation for "placement failure." Appellant had incurred nine incident reports for misbehavior, including exposing his penis in the dining area in front of staff and peers, for which appellant was cited by police for indecent exposure. D.H. denied he intentionally exposed himself.

In April 2012, the probation officer's supplemental report noted that a JAIS reassessment was completed on April 2, 2012; it continued to identify D.H. as a moderate risk for reoffense. No mention was made of the JAIS reassessment on September 23, 2011, which returned a low risk assessment. Because "the JAIS assessment tool does not accurately assess risk level for sexual offenders," a JSORRAT-II was also completed on April 2, 2012, on which D.H. also scored in the moderate risk range for reoffense.

The court continued the wardship and placed D.H. at Remi Vista group home on May 30, 2012.

Fifth Probation Violation

In September 2012, D.H. admitted he violated his probation by leaving his placement without permission. Staff reported D.H. left Remi Vista twice in August. The first time he left at 10:00 p.m. and returned the next morning at 9:00 a.m.; while away, he smoked marijuana and cigarettes. After his return, he reportedly bullied one peer and threw a banana at another. A few days later, D.H. left with a peer and did not return; while they were at large they reportedly smoked and sold marijuana. D.H. was arrested on a probation violation warrant in Shasta County (where Remi Vista is located) on August 29, 2012.

The probation officer's supplemental report filed September 21, 2012, stated that on September 14, 2012, a JAIS reassessment was completed which identified D.H. as having "a **High Risk** (score range: 11–25) for re-offense" (emphasis in original). The report did not clarify that the JAIS "is indicative of risk for *continued delinquency*" (italics added), not sexual reoffense. The JSORRAT-II continued to identify D.H. as a moderate risk for sexual reoffense.

Although much of D.H.'s conduct at Remi Vista was unacceptable, D.H.'s therapist there reported the minor did not misbehave when provided with one-on-one supervision or therapy. The therapist expressed confidence in D.H.'s ability to make more progress, as evidenced by his compliance with Juvenile Sex Offender assignments.

The court committed D.H. to juvenile hall for 83 days, to be followed by return to Remi Vista.

Sixth Probation Violation

On March 29, 2013, D.H. admitted he violated his probation by failing to obey reasonable directives of placement staff on March 19, 2013. Remi Vista staff reported that D.H. was under the influence of marijuana, brought some into the home to share with peers, walked outside and ignored staff directives to return, and set small fires while he was outside. However, allegations he used marijuana and provided it to peers and set fires were dismissed.

The probation officer's report filed May 8, 2013, indicated a JAIS reassessment was completed on April 19, 2013, and D.H.'s risk of reoffending was changed to high. No mention was made of a JSORRAT-II reassessment. D.H. disclosed to his therapist at Remi Vista that he had been molested as a child. The therapist reported the child abuse to police. D.H. expressed a desire to return to Remi Vista to "complete his treatment with the therapist he has grown to trust." He also "spoke about possible consequences of being sent to the [DJJ] and that he would then have to register as a sex offender for life." The court ordered D.H. returned to Remi Vista in May 2013.

Seventh Probation Violation; Fourth Out of Home Placement

Soon after his return to Remi Vista, staff reported D.H. engaged in rude and threatening behavior towards peers, tested positive for marijuana, methamphetamine, and amphetamine, and refused to get off a roof. On June 12, 2013, D.H. admitted that on May 30, 2013, he smoked marijuana that may have been laced with ecstasy and also did not get off the roof immediately although he heard the staff order him to do so.

The court ordered an updated psychosexual evaluation to (1) assess D.H.'s sexual behaviors and risk for sexual offense, and (2) evaluate his need for specialized sex offender treatment and make treatment recommendations, if necessary. In the updated report, psychologist Janella Street concluded D.H. "should be considered **low risk for**

sexual re-offense at this time" (emphasis in original). She recommended that D.H. "complete his individual and group therapy, with a focus on long-term relationship building, cognitive-behavioral interventions, self-esteem, empathy, and awareness of the impact of his behavior on others." She also recommended substance abuse treatment.

The probation officer's supplemental report dated September 27, 2013, referenced the general and specific recommendations in Dr. Street's report but not her risk assessment. The report recommended commitment to the DJJ. The report cited George Valencia, a DJF parole agent, as confirming that D.H. was eligible for DJJ by virtue of emergency legislation (Assem. Bill No. 324 (2011-2012 Reg. Sess, ch. 7) (Assembly Bill 324)), which went into effect February 29, 2012. That same day D.H.'s counsel filed a dispositional brief disputing that Assembly Bill 324 was retroactive or that it could be lawfully applied to D.H. consistent with ex post facto principles. At a hearing held the same day, the assistant district attorney agreed a DJJ commitment was not an option available to the court. The wardship was continued and, pursuant to the general placement order, D.H. was placed at the Teen Triumph group home on October 9, 2013.

Eighth Probation Violation

On May 16, 2014, D.H. admitted he violated his probation by disobeying orders of the group home: he left the placement for two hours without permission. The staff reported D.H.'s behavior was disrespectful to staff and confrontational with peers, although "[c]linically the minor has made significant improvements." The court continued the wardship and returned D.H. to Teen Triumph.

Ninth Probation Violation

On July 1, 2014, D.H. admitted he violated his probation by leaving the program without permission for four hours on June 22 and for three hours on June 26. According to the probation department, D.H.'s continued displays of nonconformity required continued placement and reassessment of his current risk of sexual reoffense. An updated assessment of needs and services was conducted by Gina Foppiano, ASW, a

clinician with Teen Triumph, and a copy was sent by facsimile to the probation officer on July 14, 2014. She administered a JSORRAT-II, on which D.H. "scored a 7 which places him at a Moderate Risk Level to re-offend" sexually.

According to the probation officer's supplemental report filed August 13, 2014, D.H. was working on clinical assignments from his therapist while in custody at juvenile hall, continued to do well on his return to the program, and was on track to successfully complete the sex offender treatment program on September 30, 2014. On July 18, 2014, the probation officer visited D.H. at the program. He was "in a good space" and "staff at the group home spoke positively about [D.H.] and highlighted they had never seen him work so hard within the home to get along with everyone and do his part around the group home." A JAIS reassessment was completed on July 31, 2014, and his risk level for general delinquency was reassessed as high. However, his principal service needs were impaired interpersonal skills, mental health issues, severe behavior problems, poor family dynamics, and a need to increase his physical safety. Risk of sexual reoffense was not listed. The probation department recommended continuation of the general placement order while D.H. completed his sex offender treatment. The probation officer recommended that upon D.H.'s completion of sex offender treatment as proposed on September 30, 2014, he should "be considered for successful termination of probation and returned to the care of his mother in Utah."

10th Probation Violation

On September 16, 2014, D.H. admitted he violated his probation by being terminated from his group home for poor behavior. His therapist reported he was suspended from school for getting into a fight on September 9, and for smoking marijuana in the home over the previous weekend. "She indicated the program was at a loss on how to handle his behavior and that they are having '[d]ifficulty with getting him to do what he needs to do.' " Incident reports attached to the termination notice indicated that between August 13 and September 6, 2014, D.H. refused to follow instructions from

staff to get off the roof, cursed nonstop and acted out one entire day, called a peer a "faggot" and threw an apple at him the next day, got high on marijuana and refused to drug test, and tested positive the next day.

Disposition Reports and Hearings

On October 2, 2014, the probation officer recommended that D.H. serve 90 days in custody "as a limit setting consequence," that he be terminated unsuccessfully from probation, and returned to his mother in Utah before his 18th birthday. "[S]ending the minor home to his mother as a juvenile instead of as an adult would give her more control over decisions that need to be made in support of his success in Utah."

At a hearing the same day, the court indicated it was "troubled by the recommendation" because D.H. had "never completed a sex offender program." The court set the matter for a contested disposition hearing and requested briefing on D.H.'s eligibility for DJJ. Defense counsel filed a brief in support of outpatient treatment in Utah. She argued the prior judge found D.H. was not DJJ-eligible, and retroactivity, ex post facto, and equal protection principles barred application of Assembly Bill 324 to him. The brief also argued DJJ was not appropriate for D.H. and the court had the discretion to order D.H. into an out-of-state sex offender program despite the availability of in-state placements. Counsel also suggested the court could order a psychosexual evaluation to assess D.H.'s current risk for sexual reoffense.

At a hearing on October 24, 2014, the court found it had the discretion to send D.H. to DJJ. The probation officer explained she had not recommended DJJ in the current report because of Judge Fracchia's previous ruling. However, the probation department had strongly believed D.H. was eligible for DJJ in July 2013 and had recommended it then. She understood there were sex-offender programs in Utah, but had not looked into them very much. She had "put it on mom to research a lot of stuff that was available in Utah." The court asked counsel to research programs and share the

information with the district attorney. At defense counsel's request, the court ordered another psychosexual assessment.

On November 14, 2014, the probation officer wrote an addendum to her October 2, 2014 report; she now recommended DJJ. On December 12, 2014, the court appointed Dr. James Rokop, Ph.D, who is a certified NOJOS provider in Utah,[5] to evaluate appellant.

Dr. Rokop's report was filed January 9, 2015. D.H. rated a borderline moderate to high score for future criminality or violence using the Structured Assessment of Violence Risk in Youth (SAVRY). He scored a 3, in the low-moderate range for sexual reoffense, on the JSORRAT-II assessment tool. Dr. Rokop questioned the accuracy of the Teen Triumph clinician's score of 7. D.H. also scored in the low-moderate risk range on the J-SOAP-II. Unique risk-elevating considerations included D.H.'s history of sex offender treatment failure in multiple placements and cannabis abuse.

Comparing the factors favoring a commitment to the DJJ with factors favoring receiving treatment in Utah under mother's care, Dr. Rokop recommended treatment in Utah, as long as D.H. had at least one session weekly of individual therapy with a certified sex offender treatment provider other than the therapist who was seeing his mother; one session weekly of family therapy; at least two sessions per month of group therapy for sexually offending juveniles in Salt Lake City; a psychiatric appointment to reconsider treatment options for impulsivity, low frustration tolerance, depression, and irritability, as well as ongoing symptoms of ADHD; weekly or biweekly outpatient substance abuse group therapy; and ongoing probation supervision. Dr. Rokop would recommend consideration of a commitment to DJJ or a NOJOS level 4 to 6 facility in Utah if there was additional sexual offending or an increase in the level of violent acting out, such as use of a weapon during a fight.

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[5] NOJOS is a "network of juveniles offending sexually" provider network in Utah.

A contested disposition hearing was held on February 25 and February 27, 2015, at which four witnesses testified: George Valencia, a parole agent with the DJJ, Heather Bowlds, the associate director of mental health for the DJJ, probation officer Shannon West, and defense counsel Amy Morton. At the conclusion of the hearing, the court committed D.H. to the DJJ.

Mr. Valencia described the intake process once the ward arrives at the facility. There is a 45-day evaluation to assess treatment needs and determine which programs would be best suited, based on the ward's offense and circumstances. DJJ offers a substance abuse program, which takes six months to complete, a mental health program, educational services, a gang intervention program, a reentry program, a 10-week cognitive behavior intervention program, a 33-session counterpoint program designed to address antisocial attitudes and negative peer influence, and a sexual behavior treatment program. Not all wards will participate in all programs; it depends on individual treatment needs. DJJ's schools are accredited by the Western Association of Schools and Colleges, so wards can earn a high school diploma while there. DJJ has vocational programs and a community college program. Any ward with an Individualized Education Program (IEP) has an adviser who meets with him or her regularly and updates the IEP as needed.

Dr. Bowlds described the sexual behavior treatment program (SBTP), which she helped design. A new treatment program was implemented in 2012 which focuses a lot more on developing pro-social skills, although discussing the offense remains the most import aspect of treatment. Extra testing for recidivism risk is done. DJJ uses the JSORRAT-II and the J-SOAP-II to assess wards for recidivism risk. They do not use the SAVRY.

The program takes 18 to 24 months to complete. After a 10-week psycho-educational course, the wards move to a unit of 36 youths in a residential setting where they work on a seven-stage program. The program entails three hours per week of group

therapy with a psychologist, one hour per week of individual time with a counselor, and two hours a month of individual time with a psychologist. There are also resource groups dealing with self-expression, giving back to the community, anger control, "mood matters," and surviving trauma, but not substance abuse, because a lot of the stage work is similar. Youths who struggle because of their mental health issues are moved to a mental health unit. Families are asked to meet with staff without the youth present to have their questions answered. Families are encouraged to call and visit. There are recreational sports. The pool in the summer is reserved for those who "are really shining in treatment." The SBTP at DJJ was recently released from a remedial plan. Their court expert described the program as "cutting edge" for the country.

A study of recidivism among a cohort of wards in 2007 was published in 2010. The recidivism rate was in the "20 percent-ish" range. The average range of recidivism for juveniles who go through a community treatment program is 7 percent.

A majority of wards will have to register as sex offenders all their lives. A rare few who have non-section 707, subdivision (b) (section 707(b)) offenses will have the possibility of having their records sealed, at which point a judge could determine that registration would not have to be lifelong.

Dr. Rokop testified as an expert on juvenile sex offenders and juvenile offenders in general. He is licensed to practice in Utah and California. He considered both the DJJ and the Utah options and concluded D.H. would be better served in Utah. Dr. Rokop confirmed that D.H. scored a 3 on the JSORRAT-II, which put him in the low risk range for sexual reoffense. D.H. did not show signs of sexual deviancy. In Dr. Rokop's view, D.H.'s misbehavior in group homes has not necessarily been serious and has been a reaction to being institutionalized in residential treatment. Because he has missed out on parental nurturance, he is very conflicted about normal adolescent developmental concerns such as wanting to be independent. "[F]rom a risk perspective, you want to treat low-risk offenders on an out-patient basis." This risk/needs responsivity model is

the prevailing treatment model. Dr. Rokop did not think D.H.'s sex offender treatment needs were "all that great," especially as compared with his need for substance abuse treatment and family therapy. There were also lingering concerns about the effects of his ADHD.

D.H. tested in the moderate- to high-risk range of nonsexual offending and, given his history, would be most at risk to reuse drugs, be disruptive, and go AWOL. Dr. Rokop consulted with another expert who is a recognized national expert on juvenile sex offending. He agreed the program in Utah could work for D.H. "[T]he main issue at Utah is going to be compliance, really." Dr. Rokop believed some of the public safety concerns posed by D.H. would be addressed by the isolation of the ranch in Utah where he would be living. Those concerns were that D.H. might run away from home, do drugs, violate curfew, possibly sell drugs or hang out with other delinquents. He did not have concerns that D.H. would reoffend sexually. He agreed the places where treatment options were located would be a one and one-half to two hours' drive from the ranch. He believed D.H. was capable of participating in treatment, but he acknowledged that his internalized tendency to view himself as not capable of doing it would be a challenge. However, Dr. Rokop believed "ultimately, the benefit for [D.H.] and being returned home outweighs further institutionalization."

Dr. Rokop relied on the sustained petition for the nature of the charge, not the police report or the appellate opinion. In any event, those sources did not change his opinion. He did acknowledge that he received very different narratives of D.H.'s young life from his father and mother. However, since there was no sexual deviancy in the last four years, he did not give that discrepancy a lot of weight. He did consider the indecent exposure incident and the hot dog incident sexual misbehavior, but he did not consider either incident serious. He did think D.H. was in need of sex offender treatment and that it was important for D.H. to complete it.

Probation officer Shannon West has been D.H.'s probation officer intermittently since February 2013. D.H. always expressed fear of going to DJJ. She read Dr. Rokop's report and heard his testimony and was still of the opinion that D.H. would best be served at DJJ. D.H. has consistently throughout his probation shown defiance toward rules and sex offender treatment. Her concern was that his "behavior will continue to interrupt his progress in sex offender treatment. And his behavior demonstrated that he needed more containment to allow himself to have the sex offender treatment. [¶] . . . [T]he [DJJ] . . . can address the containment and . . . the behavior." She believed he would continue to run away, use substances, and not follow rules if he went to Utah.

Defense counsel testified she made it a point to be clear with D.H. about the legal consequences of his bad choices. Sometime after Judge Fracchia and the district attorney agreed D.H. could not be sent to DJJ, she "realized the law had changed." And from that point on she informed him that the law had changed and the court had the option of sending him to DJJ and, if he went there and was discharged, he would have to register for the rest of his life.

DISCUSSION

I. The Court Did Not Abuse Its Discretion in Committing Appellant to the DJJ.

Appellant argues the juvenile court abused its discretion by committing him to the DJJ because he had only a few weeks left to finish in the sex offender program, and the unfinished segment pertained to his own victimization as a molested child. Thus, if he had not been molested, he would have already completed the sex offender program, making the commitment punishment for being a victim of sexual assault.[6] Additionally,

[6] As noted in Dr. Rokop's report, questions remained about whether appellant was molested as a child. In any event, appellant was treated as if he had been the victim of molestation himself, and appellant's therapist was present in court on July 1, 2014, when counsel represented to the court that as of that date appellant had been in the sex offender program for nine and one-half months and the remaining module appellant had yet to address was "his own victimization."

despite his continued misbehavior, as of September 3, 2014, appellant was making consistent progress in therapy. Appellant further argues the court failed to recognize the special educational, psychological, and emotional bases of his behavior and was unaware that appellant was taking psychotropic medications or had special educational needs. Finally, appellant argues the court unreasonably refused to place him with his mother after four years of separation, contrary to the purpose and intent of the juvenile court law to support family reunification (§ 202, subd. (a)), unreasonably rejected the evidence presented by a court-appointed expert, and mistakenly believed appellant had more than one commitment offense and presented a moderate risk to reoffend sexually.

"The decision of the juvenile court may be reversed on appeal only upon a showing that the court abused its discretion in committing a minor to [DJJ]. [Citations.] An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the dispositional hearing in light of the purposes of the Juvenile Court Law." (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.)

The dual purposes of the juvenile court law are "(1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public . . . .' " (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614, quoting § 202.) To that end, the juvenile court considers the probation officer's report and any other relevant and material evidence that may be offered (§ 202, subd. (d)), as well as the age of the minor, the circumstances and gravity of the offense, the previous delinquent history, and other relevant and material evidence (§ 725.5). The juvenile court is not required to discuss

specifically each of these factors in making its decision, and it is sufficient if the record reflects that they were, in fact, considered. (*In re John F.* (1983) 150 Cal.App.3d 182, 185.)

It is true "the statutory scheme contemplates a progressively more restrictive and punitive series of dispositions starting with home placement under supervision, and progressing to foster home placement, placement in a local treatment facility, and finally placement at the DJJ." (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.) Nevertheless, "there is no absolute rule that a DJJ commitment cannot be ordered unless less restrictive placements have been attempted." (*Ibid*.) Furthermore, there is no requirement that the juvenile court expressly state on the record the reasons for rejecting less restrictive placements. (*In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1159.) On the contrary, "if there is evidence in the record to show a consideration of less restrictive placements was before the court, the fact the judge does not state on the record his consideration of those alternatives and reasons for rejecting them will not result in a reversal." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577.) On the other hand, "there must be some evidence to support the judge's implied determination that he sub silentio considered and rejected reasonable alternative dispositions." (*Ibid.*) Appellant cites us no rule prohibiting a juvenile court from choosing a DJJ commitment for a serious sexual offense after a ward's repeated treatment failures in less restrictive placements, even if those failures do not rest on the commission of new criminal offenses.

The court stated on the record it had "looked carefully . . . at the entire file." The juvenile court considered an abundance of evidence, including disposition reports, psycho-sexual evaluations, expert testimony and written information related to sex offender programming available in Utah, and testimony about sex offender programming available at DJJ. That evidence is summarized in the statement of facts and need not be repeated here. We note, however, Dr. Rokop conceded appellant needed sex offender treatment. And, while the record overall suggests appellant is at the low end of a

moderate risk to reoffend sexually, the court was not clearly wrong to peg appellant's risk as moderate.

A DJJ commitment is not an abuse of discretion where the record demonstrates "both a probable benefit to the minor . . . and the inappropriateness or ineffectiveness of less restrictive alternatives." (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Teofilio A., supra,* 210 Cal.App.3d at p. 576.) In this case, less restrictive placements were tried, and tried again. Appellant was terminated from them for obnoxious and sometimes unsafe behavior the placements eventually found intolerable, such as climbing on roofs, calling a peer a "faggot," throwing an apple at the same peer, getting high on marijuana, refusing to drug test, then testing positive the next day. Counsel admitted she had "checked" and found no other placements which were less restrictive and which offered sex offender treatment in California. The record shows the court gave serious consideration to placing appellant with mother and letting her supervise appellant's access to a constellation of outpatient services in Utah, but concluded it was all too likely appellant would walk away from treatment given half a chance. Dr. Rokop did not disagree: "[T]he main issue at Utah is going to be compliance, really." The record also shows that DJJ offered treatment programs, plus containment. To be sure, the record also supported the view that it was time to try something other than containment, and that DJJ, for all its programs, had a recidivism rate in the 20 percent range for even low-risk sex offenders. Nevertheless, on this record we cannot say the juvenile court abused its discretion in concluding appellant would derive a probable benefit from treatment at DJJ, and that public safety would also be better served. No abuse of discretion appears.

II. The Court Did Not Misunderstand the Scope of Its Discretion to Choose Parent Placement With Outpatient Treatment Over a DJJ Commitment.

Appellant argues the court erroneously believed it could not send him to the outpatient program in Utah unless it was able to find, under section 727.1, subdivision (b), "that the facilities or programs here in the State of California, specifically

the Department of Juvenile Justice, is inadequate to meet his needs." The court indicated it could not make that finding. On the contrary, it found that DJJ "meets all of his needs." We agree this comment, and other comments the court made concerning section 727.1, suggest a misunderstanding about when section 727.1 applies, and when it does not.

By its terms, section 727.1 only applies to foster care placements in group homes and prohibits placement "in a private residential facility or program that provides 24-hour supervision outside of the state" unless certain conditions are met.[7] (§ 727.1, subd. (b).)

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[7] The version of section 727.1 in effect on February 27, 2015, provided in relevant part:

"(a) When the court orders the care, custody, and control of the minor to be under the supervision of the probation officer *for foster care placement* pursuant to subdivision (a) of Section 727, the decision regarding choice of placement shall be based upon selection of a safe setting that is the least restrictive or most family like, and the most appropriate setting that is available and in close proximity to the parent's home, consistent with the selection of the environment best suited to meet the minor's special needs and best interests. The selection shall consider, in order of priority, placement with relatives, tribal members, and foster family, group care, and residential treatment pursuant to Section 7950 of the Family Code.

"(b) Unless otherwise authorized by law, the court may not order the placement of a minor who is adjudged a ward of the court on the basis that he or she is a person described by either Section 601 or 602 *in a private residential facility or program that provides 24-hour supervision*, outside of the state, unless the court finds, in its order of placement, that all of the following conditions are met:

"(1) In-state facilities or programs have been determined to be unavailable or inadequate to meet the needs of the minor.

"(2) The State Department of Social Services or its designee has performed initial and continuing inspection of the out-of-state residential facility or program and has either certified that the facility or program meets all licensure standards required of *group homes* operated in California or that the department has granted a waiver to a specific licensing standard upon a finding that there exists no adverse impact to health and safety, pursuant to subdivision (c) of Section 7911.1 of the Family Code.

"(3) The requirements of Section 7911.1 of the Family Code are met." (Stats. 2001, ch. 831, § 8, pp. 6814–6815, italics added.)

It manifestly does not apply to outpatient treatment when the ward is placed at home with the parent. (See *In re Oscar A.* (2013) 217 Cal.App.4th 750, *In re Khalid B.* (2015) 233 Cal.App.4th 1285.)

We do not agree the court's error necessarily indicates it misunderstood the scope of its discretion to choose a disposition other than commitment to DJJ, or requires a remand for a new dispositional hearing. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 348 [remand required because trial court sentenced the defendant as a sex offender pursuant to § 667.6, subd. (c) without stating reasons for choosing that section over § 1170.1]; *People v. Deloza* (1998) 18 Cal.4th 585, 600 [remand required because trial court erroneously believed it could not impose concurrent sentences under the three strikes law]; *People v. Newsome* (1997) 57 Cal.App.4th 902, 913 [same].) The court's comments about section 727.1 indicate it perhaps did not understand that statute. However, viewed in totality, the court's comments do not suggest the court misunderstood it had no discretion to return appellant to his mother in Utah with her supervising his engagement with outpatient services, including sex offender treatment. For example, the court confirmed with defense counsel that the only alternative to DJJ being presented for its consideration was the out-of-state option, and that there were no other untried, less restrictive, sex offender homes in state. In our view, the court's overall comments underscored its belief that the Utah option was unworkable as a practical matter in this case, whereas a DJJ met all of appellant's needs and addressed the public safety risk he posed without treatment.[8] Under these circumstances, the court's comment

[8] Immediately before commenting on section 727.1, the court stated: "I have no qualms about what [mother's] intentions are and what she wants to do for the best interests of her son and that she is dedicated to making it succeed. But I have to say: We haven't been able to do it here in all of the settings that we have put him. And I can't imagine how his mother would be able or capable of doing it. [¶] He's a flight risk. He is. And the suggestion of sending him out of the jurisdiction of this state, to the State of Utah, well, if he runs, well, we may never get him back, ever. And that means that he would be out there without this treatment that he so desperately needs. [¶] And the risk

about section 727.1 did not signal a misunderstanding about the scope of its dispositional discretion.

III. The Judge Who Presided Over Appellant's Last Probation Violation Was Not Bound by an Earlier Judge's Ruling That D.H. Was Not DJJ-Eligible.

Appellant argues Judge Daniels did not have the authority to overrule Judge Fracchia's determination he was ineligible for DJJ. (*People v. Riva* (2003) 112 Cal.App.4th 981, 989–993; *People v. Barros* (2012) 209 Cal.App.4th 1581, 1597–1598.) We disagree.

Judge Fracchia presided at the disposition hearing on September 27, 2013, concerning D.H.'s seventh probation violation. D.H. had admitted he violated his probation by smoking marijuana and failing to promptly heed staff orders to get off a roof. The probation officer's report for the hearing had recommended commitment to DJJ. The report cited George Valencia, a DJJ parole agent, as confirming that D.H. was eligible for DJJ by virtue of emergency legislation (Assembly Bill 324), which went into effect February 29, 2012. D.H.'s counsel had filed a dispositional brief citing *In re C.H.* (2011) 53 Cal.4th 94 (*C.H.*) for its holding that under former section 731(a)(4), commission of an offense described in section 707(b) is a prerequisite for commitment to DJJ. She disputed that Assembly Bill 324 could be applied retroactively to D.H., since his offense was committed in 2009 and his commitment to DJJ would be constitutionally barred as ex post facto. At the hearing, Judge Fracchia indicated he had discussed the legal issues with the attorneys informally. On the record, the district attorney agreed a DJJ commitment was not an option available to the court. The court continued the wardship and ordered D.H. to be placed in a suitable foster home or institution by the probation department.

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that that poses to the public without this treatment, the Department of Juvenile Justice also addresses that need squarely."

Judge Daniels presided over proceedings related to D.H.'s *10th* probation violation, almost one year later, in September 2014. The probation officer recommended D.H. serve 90 days in custody "as a limit setting consequence," be terminated unsuccessfully from probation, and returned to his mother in Utah.

At dispositional proceedings on October 2, 2014, Judge Daniels indicated it was "troubled by the recommendation" because D.H. had "never completed a sex offender program." He admitted he was unfamiliar with the history of D.H.'s case. The judge inquired if D.H. was eligible for DJJ and was told by appellant's counsel that his eligibility had been litigated and he was not eligible. The district attorney stated her notes indicated the matter was "actually litigated" and the People had conceded D.H. was ineligible.

The court set the matter for a contested disposition hearing and requested briefing on D.H.'s eligibility for DJJ. Defense counsel filed a brief arguing, among other things, the prior judge had found appellant ineligible for DJJ based on *C.H.*, *supra*, 53 Cal.4th 94 and ex post facto principles. The brief also acknowledged that Assembly Bill 324 was enacted in 2012 to remedy the effect of the holding in *C.H.* and the courts in *In re Edward C.* (2014) 223 Cal.App.4th 813 (review den. May 14, 2015, S216974) (*Edward C.*) and *In re K.J.* (2014) 224 Cal.App.4th 1194 (review den. June 25, 2014, S218043) (*K.J.*) had found the ban against ex post facto laws did not bar application of the new law to juveniles whose offenses predated the statute.

At the continued disposition hearing on October 24, 2014, the court indicated it had read counsel's brief and *K.J.* The state of the law and the record were discussed. The court indicated it was not aware Judge Fracchia had ruled previously on the matter because "they've never sent me volume one of this file." Counsel agreed "*K.J.* is the law," but argued it was unfair to apply it to appellant because he did not have "fair warning." Pending the filing of a responsive brief from the prosecutor, the court tentatively ruled it had the authority to send D.H. to DJJ. No responsive brief was filed.

"It is often said as a general rule one trial judge cannot reconsider and overrule an order of another trial judge. There are important public policy reasons behind this rule." (*People v. Riva*, *supra*, 112 Cal.App.4th at p. 991, fn. omitted.) "Naturally, as with all general rules, there are exceptions . . . ." (*Ibid*.) However, the power to override a prior judge's ruling "is not unlimited. It must be exercised in conformity with the defendant's right to due process of law or, as one court put it, 'with due consideration,' which means the defendant must be given notice and an opportunity to be heard, and the revised ruling cannot be arbitrary or made without reason. . . . [¶] Furthermore, for reasons of comity and public policy . . . trial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include . . . whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*People v. Riva*, at pp. 992–993, fns. omitted.)

In this case, the requirements of due process were fully met. The record shows both counsel were given the opportunity to brief and argue their positions. Furthermore, there had been a significant change in the law since the previous order was made. At the time Judge Fracchia ruled, the only case before the court was *C.H.*, which clearly indicated a violation of section 288, subdivision (a) was not among the DJJ-eligible offenses in 2009. Although Assembly Bill 324 had been enacted to remedy the situation recognized by *C.H.*, there was a colorable argument the law could not constitutionally be applied to appellant. When Judge Fracchia made his ruling, the lead case was still *C.H.* and he exercised his judgment as to the proper disposition of appellant's *seventh* probation violation.

However, by the time Judge Daniels took up the question, circumstances had changed dramatically in two ways. First, Judge Daniels was considering what to do

about appellant one year later, after his 10th probation violation; he was not seeking to undo the same disposition Judge Fracchia had fashioned. Second, two Courts of Appeal had considered the ex post facto question in published opinions and concluded no constitutional impediment barred application of the new law to offenses committed before its enactment. The legal landscape was no longer what it had been when Judge Fracchia ruled. Under these circumstances, it was not error for the second judge to reconsider the ruling of the first judge.

IV. There Was No Agreement That a DJJ Commitment Would Not Be Imposed After Appellant's 10th Probation Violation.

Appellant argues he entered into a plea agreement which included the promise he would not be committed to DJJ, and the commitment exceeded the punishment contemplated in the plea agreement. (Pen. Code, § 1192.5.) He argues the Attorney General should be estopped from arguing otherwise, and "agreement for a non-DJJ placement must be enforced."

Appellant's assertion is not supported by the record on direct appeal. On September 16, 2014, appellant completed a waiver form in connection with his admission that he violated his probation by being terminated unsuccessfully from his group home for poor behavior. He initialed the following statements: "I further understand that as a result of my violation of probation, the Court has the power to resentence me. I understand that the sentence I receive is solely within the discretion of the Court. The Court may reinstate my probation with new terms and conditions or the Court may sentence me to the Division of Juvenile Justice or a local confinement facility. **The maximum punishment which the Court may impose based upon this admission is** 8 years." Appellant also initialed the following statement: "**I FURTHER UNDERSTAND:** [¶] . . . [¶] b) I understand that if, as a result of my admissions, I am made a ward of the court that the court has many options at its disposal ranging from returning me to my home to placing me in the Division of Juvenile Justice or a local

confinement facility." Before accepting the plea, the court confirmed, and appellant agreed, no promises were made to him. Manifestly, there was no agreement on the record for a non-DJJ disposition. We therefore reject appellant's argument.

V. The Legislature Intended the Retroactive Application of the 2012 Amendment of Section 731(a)(4).

Appellant's eligibility for a DJJ commitment depended on the application to him of the 2012 amendment of section 731(a)(4), which made the offenses listed in Penal Code section 290.008 DJJ-eligible, contrary to the holding of *C.H., supra,* 53 Cal.4th 94, that a necessary prerequisite to DJJ eligibility is the commission of an offense listed in section 707(b). Appellant argues amended section 731(a)(4) applies prospectively only—that is, to crimes committed after its amendment—and application of the amended statute to him is unauthorized because his DJJ eligibility is premised on a 2009 offense. This argument has been rejected in two published Court of Appeal decisions. (*Edward C., supra,* 223 Cal.App.4th 813, *K.J., supra,* 224 Cal.App.4th 1194.)

Assembly Bill 324 included legislation which amended section 731(a)(4) and enacted section 1752.16, which authorized housing at the DJF for wards who were in the custody of the DJF on December 12, 2011, and who otherwise would have been entitled to release from there under *C.H.* because they had been committed to the DJF for an offense listed in Penal Code section 290.008, but had never been adjudged a ward of the juvenile court for an offense listed in section 707(b). The purpose of section 1752.16 was to nullify the decision in *C.H.* (*Edward C., supra,* 223 Cal.App.4th at p. 824; *K.J., supra,* 224 Cal.App.4th at p. 1202.) The court in *K.J.* decided these two statutes "were plainly intended to apply to those wards who had been adjudicated prior to Assembly Bill 324's effective date." (*K.J.*, at p. 1202.) After exhaustively reviewing the legislative history of section 731 dating back to 1992, the court in *Edward C.* accepted the Attorney General's concession, for the purposes of ex post facto analysis, the amendment was applied retroactively to the minor in that case. (*Edward C.*, at p. 825.) It did not separately

discuss whether the legislation was intended to be retroactive or prospective in its application. Both cases decided after extensive analyses that retroactive application of section 731(a)(4) did not violate ex post facto principles because the law was not intended to be punitive (*K.J.*, at pp. 1206–1207) and did not increase punishment (*Edward C.*, at pp. 825–828).[9]

Appellant argues *Edward C.* and *K.J.* were wrongly decided. In particular, he argues that neither case addresses his argument that section 1752.16, which he concedes is retroactive, "was necessary *only* because section 731(a)(4) could not be applied retroactively." (Italics added.) He also argues section 1752.16's housing provision would be unnecessary if section 731(a)(4) were retroactive, because the 65 wards who were committed to DJJ on the basis of offenses listed in Penal Code section 290.008 but not section 707(b) could simply have remained in place as DJJ committees instead of housed wards.

Appellant's arguments do not withstand scrutiny. Appellant assumes all wards whose commitments were affected by *C.H.* on December 12, 2011, continued to be placed at DJJ as of February 29, 2012, when Assembly Bill 324 became law. However, as the *K.J.* court explained, section 1752.16 provided housing for wards who, pursuant to *C.H.*, "already had their commitment recalled by a court." (*K.J., supra,* 224 Cal.App.4th at p. 1202.) Some of those wards may have already been returned to juvenile court; the

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[9] We note a line of authority under which commitment to DJJ after a new probation violation could be viewed as a *prospective* application of the statute. In *John L. v. Superior Court* (2004) 33 Cal.4th 158 (*John L.*), our Supreme Court considered whether application of amended section 777 to the minors there was a retroactive application of the law for ex post facto purposes "because it affects probation ordered for section 602 crimes predating Proposition 21." (*John L.*, at p. 174.) The court rejected the claim, explaining: "Both this court and the Courts of Appeal have long held that someone who was convicted and sentenced for one crime, and who commits a new crime *or other misconduct* while either on conditional release or in custody for the original conviction, is subject to new penalties and adverse procedural laws enacted between the time of the two acts." (*Id.* at p. 174 & fn. 4, italics added.)

commitments of those wards who remained at DJJ were presumptively invalid under *C.H.* pending corrective legislation. "Assembly Bill 324 was passed as an urgency measure to 'address the California Supreme Court's ruling in [*C.H.*],' '[i]n order to protect the public by preventing the possible release of juvenile offenders who committed serious or violent offenses or sex offenses.' (Stats. 2012, ch. 7, §§ 3, 4.)" (*K.J.*, at p. 1202.) Thus, section 1752.16 served a legislative purpose independent of whether section 731(a)(4) applied to wards who committed offenses listed in Penal Code 290.008 prior to 2012, but who had not been committed to DJJ as of February 29, 2012. The Legislature was entitled to conclude that proceeding by way of a housing provision would more expeditiously further that purpose than returning all wards to juvenile court for dispositional hearings.

Further, we see no constitutional or practical reason section 731(a)(4) must be prospective. Although it is the norm for new statutes to apply prospectively, legislative history may signal a legislative intent to enact a law with retroactive reach. Such is the case here. Prior to 2007, there were few limits on DJJ eligibility. (*Edward C., supra*, 223 Cal.App.4th at p. 821.) In 2007, for fiscal reasons, the Legislature narrowed eligibility but "did not intend to exclude juvenile sex offenders from DJF commitments." (*Id.* at p. 822.) In *C.H.*, the Supreme Court read the 2007 amendments of sections 730 and 731 in a narrow fashion that excluded certain sex offenses. (*Edward C.*, at p. 823.) In 2012, the Legislature enacted new amendments to effectuate its intent. As the *K.J.* court observed, "the Legislative Counsel's summary of Assembly Bill 324 states: 'This bill would expand the class of persons who may be committed to the [DJF] to include a ward who has committed a specified sex offense, or who was *previously found* to have committed a specified serious or violent offense or a specified sex offense.' " (*K.J., supra,* 224 Cal.App.4th at p. 1202.) Appellant objects to *K.J.*'s interpretation of this language, but in our view it is a more reasonable interpretation than appellant's circular explanation that "[s]ection 731(a)(4) already applied to wards who were 'previously

found' to have committed certain offenses. [It] simply carried that provision forward and added a new set of offenses [in Pen. Code, § 290.008] that could qualify a ward for DJJ. . . . Thus, the reference to 'previously found' is simply an acknowledgement of existing law, not an indication that it should be given retroactive application."

Finally, appellant appends to his opening brief a press release by the author of the bill which purports to show the legislator understood section 731(a)(4) would apply "going forward," i.e., prospectively. However, " '[t]he statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation.' " (*People v. Wade* (2016) 63 Cal.4th 137, 143.)

We have carefully reviewed appellant's arguments in light of *K.J.* and *Edward C.* and we find no reason to disagree with their reasoning. Accordingly, we reject appellant's arguments that section 731(a)(4) was not intended to apply retroactively.

VI. Retroactive Application of Section 731(a)(4) Does Not Violate Ex Post Facto Principles.

Defendant argues that retroactive application of section 731(a)(4) to him violates the ban against ex post facto laws because it made him eligible for a commitment to DJJ, which is a "youth prison," and therefore a greater punishment than what was available before the amendment. The ex post facto clauses of the state and federal constitutions apply to juvenile wardship proceedings. (*John L. v. Superior Court, supra*, 33 Cal.4th at pp. 171–172.) To violate the ex post facto ban, a retroactive law "must have one of the following four effects: it makes criminal acts that were innocent when done; it makes the crime greater or more aggravated than it was when committed; it inflicts a greater punishment for the crime than was available when the crime was committed; or it alters the rules of evidence or the required proof for conviction." (*In re Robert M.* (2013) 215 Cal.App.4th 1178, 1186.) The arguments that a DJJ commitment imposes a greater punishment than was previously available were thoughtfully discussed and rejected in

Edward C., supra, 223 Cal.App.4th at pages 825 through 826 and *K.J., supra,* 224 Cal.App.4th at pages 1202 through 1211. We agree with the reasoning and conclusion of those cases and see no need to repeat them here.

VII. Equal Protection Is Not Violated by Assembly Bill 324.

Appellant argues that retroactive application of Assembly Bill 324 to him denies him equal protection of the law. He posits that he is similarly situated to the 65 wards who, like him, committed offenses listed in Penal Code section 290.008 prior to 2012, but who, unlike him, were committed to DJJ prior to the decision in *C.H., supra,* 53 Cal.4th 94, in 2011. He argues those 65 wards were treated more leniently than he is—or he is being treated more harshly than they were—in that their commitments "were reversed, and converted into 'housing' orders,' " which did not subject them to sanctions under Penal Code section 290.008 (lifetime sex offender registration), among others. (See *In re Robert M., supra,* 215 Cal.App.4th at pp. 1182–1183.) He argues this statutory scheme is irrational because "it is reasonable to infer that the wards who were committed earlier had more significant criminal histories."[10]

"The crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws. [Citation.] However, neither clause [of the United States or California Constitutions] prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations

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[10] The Attorney General argues D.H. has forfeited his equal protection claim because he did not raise it below. We disagree. In his brief in support of outpatient treatment in Utah, D.H. argued the unfairness of forcing him to register as a sex offender for the rest of his life when more serious offenders who were housed and not committed to DJJ do not have to register. In addition, we exercise our discretion to consider appellant's equal protection claim on the merits because " 'the issue is still one of law presented by undisputed facts in the record before us that does not require the scrutiny of individual circumstances, but instead requires the review of abstract and generalized legal concepts—a task that is suited to the role of an appellate court. [Citations.] We also confront the issue to avert any claim of inadequate assistance of counsel.' " (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493.)

be justified by sufficient reasons. The necessary quantum of such reasons varies, depending on the nature of the classification." (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270.) Classifications based on race or national origin or which affect fundamental rights are given strict scrutiny. Classifications based on sex or illegitimacy are given intermediate scrutiny. (*Clark v. Jeter* (1988) 486 U.S. 456, 461.) All other statutory classifications are evaluated merely for the existence of a rational basis supporting its enactment. (*In re Evans,* at p. 1270; *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*).) Prisoners are not a suspect class and they have no fundamental interest in a specific term or type of imprisonment. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 178; *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) "Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." '" (*Johnson,* at p. 881.) " 'This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in " 'rational speculation' " as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review "whether or not" any such speculation has "a foundation in the record." ' [Citation.] To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its ' "wisdom, fairness, or logic." ' " (*Ibid.*)

We are not persuaded appellant is similarly situated to wards who were already committed to DJJ when *C.H.* was decided. Not all wards who are adjudicated as having committed offenses listed in Penal Code section 290.008 are committed to DJJ. They receive different dispositions, depending on their individual histories and circumstances.

In 2011, when *C.H.* was decided, appellant's conduct was not considered serious enough to warrant a DJJ commitment, whereas the conduct of the 65 wards at issue here was so considered. The fact they were all adjudicated prior to 2011 for offenses listed in Penal Code section 290.008 does not make them similarly situated with respect to their dispositions. For similar reasons, the appellate court in *Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374 concluded juveniles adjudicated of violating Penal Code section 647.6 and committed to DJJ for that offense "are not similarly situated for purposes of mandatory sex offender registration to juvenile violators of section 647.6 who were never committed to the Division of Juvenile Facilities. Ruelas and others like him were found to have merited commitment to the Division of Juvenile Facilities for their sex offenses, whereas those in the other group were not." (*Id.* at pp. 382–383.)

Assuming for the sake of D.H.'s argument he is similarly situated to wards who were committed to DJJ before the decision in *C.H.* and who had their commitments recalled in the interval between *C.H.* and the enactment of Assembly Bill 324, treating wards differently based on the date of their commitment to DJJ is rationally related to a legitimate governmental purpose. As noted, "Assembly Bill 324 was passed as an urgency measure to 'address the California Supreme Court's ruling in [*C.H.*],' '[i]n order to protect the public by preventing the possible release of juvenile offenders who committed serious or violent offenses or sex offenses.' (Stats. 2012, ch. 7, §§ 3, 4.)." (*K.J., supra,* 224 Cal.App.4th at p. 1202.) The Legislature could rationally conclude that housing presumptively dangerous wards at DJJ as a stopgap measure to prevent their imminent release was necessary to protect the public. "Nothing compels the state 'to choose between attacking every aspect of a problem or not attacking the problem at all.' [Citation.] Far from having to 'solve all related ills at once' [citation], the Legislature has 'broad discretion' to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination." (*People v. Barrett* (2012) 54 Cal.4th 1081, 1110.)

In effect, appellant is arguing that section 1752.16 is an ameliorative statute and equal protection principles require that he get the retroactive *benefit* of that statute. In order words, because his offense predates the decision in *C.H.*, he should be treated like the 65 wards affected by section 1752.16: he should be housed instead of committed to DJJ, with the concomitant benefit that he will not be subject to the lifetime sex offender registration. However, "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505.) Analogous arguments have been rejected. (See *People v. Floyd* (2003) 31 Cal.4th 179, 188–191 [passage of Prop. 36]; *Baker v. Superior Court* (1984) 35 Cal.3d 663, 668–669 [repeal of mentally disordered sex offender law]; *People v. Rosalinda C.* (2014) 224 Cal.App.4th 1, 12 [changes to § 6500 commitments].) "[T]he legislative decision to alter or change a sentencing scheme based on that branch's determination that a modification is appropriate is recognized in the above cases along with the prerogative to set a calendar date for the commencement of that 'new' scheme." (*Id.* at p. 13.)

In addition, the amendment to section 731(a)(4) represents a legislative judgment that every ward who is discharged or paroled from DJJ after February 29, 2012, following commitment for certain adjudicated offenses, should be treated exactly the same way with respect to sex offender registration, regardless of when he or she sustained the adjudication. By enacting Assembly Bill 324, the Legislature was rectifying a prior omission imposed on other sex offenders for serious crimes. (*In re Greg F.* (2012) 55 Cal.4th 393, 410.) There is no equal protection violation.

VIII. Application of Penal Code Sections 290.008, 290.012, 290.015, and 3003.5, Subdivision (b) to Persons in Appellant's Shoes Does Not Violate Due Process.

Appellant argues that blanket application of mandatory lifetime registration, residency, and surveillance conditions (Pen. Code, §§ 290.008, 290.012, 290.015, 3003.5, subd. (b)) to all juveniles committed to DJJ for enumerated sex offenses violates

substantive due process. Appellant argues such restrictions are overbroad, arbitrary, unreasonable, and impinge on fundamental liberty interests, while having no reasonable relation to a proper legislative goal (*People v. Travis* (2006) 139 Cal.App.4th 1271, 1293), much less serving a compelling state interest (*Washington v. Glucksberg* (1997) 521 U.S. 702, 721). We disagree.

"[D]efendants who have been convicted of crimes have greatly attenuated privacy rights—especially regarding their identities. Consequently, a postconviction registration requirement for enumerated sex offenses does not infringe on any rights 'identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.' (*Washington v. Glucksberg*, *supra*, 521 U.S. at p. 727; cf. *Doe v. Tandeske* (9th Cir. 2004) 361 F.3d 594, 596–597 [rejecting substantive due process challenge to Alaska's sex offender registration statutes].)" (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1080.)

The restrictions challenged here by appellant are not " 'unreasonable, arbitrary or capricious' " but instead " 'have a real and substantial relation to the object sought to be attained.' " (*People v. Travis*, *supra*, 139 Cal.App.4th at p. 1293.) Penal Code section 290 is a "comprehensive statutory scheme governing the registration of sex offenders," the purpose of which is to make certain that sex offenders are "readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527-528; *In re Alva* (2004) 33 Cal.4th 254, 264; *People v. Sorden* (2005) 36 Cal.4th 65, 72–73.) The registration requirement is regulatory, not punitive. (*People Picklesimer* (2010) 48 Cal.4th 330, 344.) Appellant acknowledges a similar purpose guides Penal Code sections 290.008 and 290.015. Penal Code section 3003.5, subdivision (b)'s residency restrictions are likewise "a legitimate, nonpunitive regulatory device" designed to "promote public safety by physically insulating vulnerable children from potentially

recidivist registered sex offenders who might prey upon them." (*People v. Mosley* (2015) 60 Cal.4th 1044, 1050 (*Mosley*).)

Citing empirical studies, law review articles, opposition to Assembly Bill 324 by the defense bar, and *Miller v. Alabama* (2012) __U.S.__ [132 S.Ct. 2455, 2467] (*Miller*), appellant argues that application of the challenged restrictions to juveniles bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators because juvenile sex offenders are not necessarily sexual deviants, nor are they likely to sexually recidivate. However, courts have consistently upheld restrictions imposed on sex offenders against various constitutional challenges as rationally related to a legitimate government purpose. (*Mosley, supra*, 60 Cal.4th at p. 1063 [Sixth Amendment]; *Johnson*, *supra*, 60 Cal.4th at p. 881 [equal protection]; *In re Alva, supra*, 33 Cal.4th at pp. 262 [cruel and/or unusual], 276 [ex post facto]; *Smith v. Doe* (2003) 538 U.S. 84, 97 [ex post facto].) Just as a court may not redefine a regulatory device as a punitive one on rational basis review, it may not strike down a law as arbitrary, capricious, or unreasonable simply "because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." (*Smith v. Doe*, at p. 103; *Mosley,* at p. 1068.) In our view, appellant's impassioned plea, especially his argument that application of lifetime restrictions on juvenile sex offenders should be subject to the same individualized judicial discretion as life imprisonment without possibility of parole, go to the wisdom of the legislation at issue.[11] However, "[i]t is not for us to gainsay the wisdom of this legislative choice." (*Bernard v. Foley* (2006) 39 Cal.4th 794, 813.) "[T]hough the court may hold views inconsistent with the wisdom of the law, it may not

[11] We note section 781 permits the juvenile court to grant relief from the duty to register if it grants a petition to seal the former ward's records, as long as the minor did not commit an offense listed in section 707(b) when he or she was 14 years old or older. (§ 781, subds. (a)(1)(A), (C) & (D).) A petition may be filed any time after the minor attains the age of 18 and five years or more after the jurisdiction of the juvenile court has terminated. (§ 781, subd. (a)(1)(A).)

be annulled unless palpably in excess of legislative power." (*Nebbia v. New York* (1933) 291 U.S. 502, 538.) Under these circumstances we must reject appellant's substantive due process challenge to Penal Code sections 290.008, 290.012, 290.015, and 3003.5, subdivision (b).[12]

IX. Failure to Advise Appellant of the Sex Offender Registration Requirement Was Error, but Prejudice Is Not Shown on the Bare Appellate Record.

Appellant argues his admission was not knowing and voluntary because he was not advised by the court or the waiver form he initialed and signed of the "lifelong sex offender registration requirement, residency restrictions, or perpetual surveillance conditions attendant to a DJJ commitment."[13] Registration as a sex offender is a "plea consequence of which a defendant must be informed." (*People v. McClellan* (1993) 6 Cal.4th 367, 376 (*McClellan*), citing *Bunnell v. Superior Court* (1975) 13 Cal.3d 592,

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[12] We admit the *logic* of *Miller*, *supra*, 132 S.Ct. 2455, might apply with equal force to lifetime sex offender registration for a 12-year-old who commits a lewd act. (See Ioana Tchoukleva, *Children are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama* (Aug. 2013) 4 Cal. L.Rev. Cir. 92; Piper Waldron, *Youth Matters: Miller v. Alabama's Implications for Individualized Review in Juvenile Sentencing* (Winter 2013) 46 Loyola L.A. L.Rev. 775.) "[C]hildren are, as a class, 'constitutionally different from adults' due to 'distinctive attributes of youth' that 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' (*Miller*, at p. 2458.) Among these 'hallmark features' of youth are 'immaturity, impetuosity, and failure to appreciate risks and consequences,' as well as the capacity for growth and change. (*Id.* at p. 2468.) It is because of these 'marked and well understood' differences between children and adults (*Roper*[*v. Simmons* (2005) 543 U.S. 551,] 572) that the law categorically prohibits the imposition of certain penalties, including mandatory LWOP, on juvenile offenders. (*Montgomery v. Louisiana* (2016) 577 U.S.____, ____ – ____ [193 L.Ed.2d 599, 136 S.Ct. 718, 732–737].)" (*People v. Franklin* (2016) 63 Cal.4th 261, 283.) However, as long as controlling case law holds that sex offender registration is merely regulatory and not punitive, *application* of *Miller*'s logic to the lifetime sex offender registration of juveniles is beyond this court's powers under settled principles of stare decisis.

[13] Appellant does not cite any case law specific to residency restrictions and surveillance as direct consequences of a plea. The claim as to those sanctions is therefore waived, and we need not and do not address it.

605; *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481 (*Zaidi*) [failure to advise of *lifetime* registration].) Like a *possible* $10,000 restitution fine, sex registration is a direct, not collateral, consequence of the plea or admission which makes registration possible. Here, because appellant had been adjudicated as committing a lewd act on a child under 14, his admission of a probation violation triggered consideration of a commitment to DJJ, from which sex offender registration inexorably followed. "The fact a court has discretion not to impose the registration requirement for some offenses does not relieve it of the obligation to advise the defendant that registration is a possible consequence." (*Zaidi*, at p. 1485.) "Failure to advise of the sex registration requirement is error." (*Id.* at p. 1481, citing *McClellan*, at p. 376.)

The Attorney General concedes as much, but contends appellant has waived appellate review of the claim by failing to object before or at the disposition hearing. (*McClellan, supra*, 6 Cal.4th at p. 377; *People v. Villalobos* (2012) 54 Cal.4th 177, 182.) " ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . ." ' " (*McClellan*, at p. 377, quoting *People v. Walker* (1991) 54 Cal.3d 1013.) Here, appellant's counsel did object to the lack of warning that a probation violation could lead to sex offender registration in the same brief she argued for outpatient treatment and against eligibility for a DJJ commitment.[14] This should have alerted the court to correctable advisement error. We note, however, appellant never moved to withdraw his admission, even after he learned that sex offender registration was

[14] "[T]he one thing that has terrified this minor has been lifetime registration. . . . Minor's counsel can attest to his concern, and to her repeated admonishments to him that *any new serious offense* could render him eligible for DJJ. . . . He really has not had 'fair warning' that his behavior over the last five and a half years could cause him to be sent to DJJ. The only minors who face lifetime sex offender registration are those paroled from DJJ." (Italics added.) On the other hand, counsel did not specifically complain that appellant's plea was unknowing and involuntary because he was not advised of the sex offender registration requirement.

an integral component of a DJJ commitment, and that the court was seriously considering such a commitment.

Although we do not find waiver, we must reject appellant's claim. *McClellan* teaches that "[a] defendant (even on direct appeal) is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement." (*McClellan*, *supra*, 6 Cal.4th at p. 378, quoting *In re Moser* (1993) 6 Cal.4th 342, 352.) Here, as in *McClellan*, "the record of the trial court proceedings contains no evidence (nor even an assertion) concerning the bearing of a registration requirement upon defendant's decision to plead guilty, the prosecution never has had an opportunity to contest the assertion made by defendant on appeal, and the trial court had no occasion to pass upon the veracity of defendant's present claim. Indeed, to the extent the trial court record sheds any light upon the issue before us, defendant's failure to object at the sentencing hearing suggests that he did not consider the registration requirement significant in the context of his plea agreement." (*McClellan*, at p. 378.) Appellant fails to meet his burden of establishing prejudice on direct appeal.[15]

X. Appellant's Challenge to the International Megan's Law Is Not Ripe for Review.

Among other things, the International Megan's Law (Pub.L. No. 114-119 (Feb. 8, 2016) 30 Stat. 15 (IML)) requires a person who must register as a sex offender under state law to have his or her passport marked with "a unique identifier" (IML, § 8) to identify the passport holder as a sex offender, and to inform applicable registries of any international travel-related information concerning the sex offender. (IML, § 6.) This information would be shared with countries visited by the passport holder. (IML § 5.)

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[15] By separate order filed contemporaneously with this opinion, the court has issued an order to show cause on this issue only in appelllant's habeas corpus petition, *In re D.H.*, A148753.

The purpose of the IML is to "protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism." (IML, Preamble; *Doe v. Kerry* (N.D.Cal. Apr. 13, 2016, No. 16-CV-0654-PJH) 2016 WL 1446772, at p. *1.)

Appellant decries the additional burdens imposed on juvenile sex offenders by the IML, but his specific argument is that "the DJJ commitment should be reversed to protect appellant from the harmful and ever-expanding consequences of the commitment." To this argument, appellant adds that the "burdens and risks associated with the IML further support his claims in the opening brief[;] . . . [f]or example, the DJJ commitment was not fully informed since it did not consider the effect of the IML or similar legislation, and the IML compound[s] the prejudice of the DJJ commitment[,] . . . impacts appellant in unanticipated way, and unreasonably subjects a juvenile offender to lifelong burdens and grave danger."

We note the IML postdates appellant's probation violation admission and could not have affected his advisements. We also note that as of April 13, 2016, the passport identifier provision was not yet in effect, and "it will not take effect until after the Secretaries of Homeland Security and State and the Attorney General have developed a process for implementation, submitted a joint report to Congress regarding this proposed process, and, finally, certified that the process has been successfully implemented. See IML §§ 8(f), 9(a)-(b)." (*Doe v. Kerry, supra*, 2016 WL 1446772 at p. *5.)

Appellant does not allege the challenged provisions are in effect at this time. In addition, the record does not reflect he has a passport. Therefore, to the extent appellant's argument is intended as a direct attack on the constitutionality of the IML, appellant's claim is not ripe for review. (*Doe v. Kerry, supra*, 2016 WL 1446772 at p. *5.) Furthermore, to the extent appellant argues the additional potential restrictions which the IML may impose on him are further evidence that a DJJ commitment, with its attendant sex offender registration, is punitive, violates the ex post facto ban, equal

protection, and substantive due process, we reject the arguments for the reasons already stated *ante*.

XI. Appellant's Credits Must Be Corrected.

A ward is entitled to credit for time served in juvenile hall awaiting transfer to DJJ against his maximum term of confinement. (*In re J.M.* (2009) 170 Cal.App.4th 1253, 1256.) Appellant contends, and the Attorney General agrees, appellant is entitled to additional credits from February 27, 2015, the date on which the court awarded appellant 807 days of credits, and June 17, 2015, the date appellant was transferred to DJJ. We calculate that appellant is entitled to an 109 days of credit, assuming February 27 was already included in the court's calculation of 807 days, and June 17 was excluded as the first day of his commitment, for a total of 916 days of credit.

XII. The Juvenile Detention Disposition Reports Require Correction.

This court may correct clerical errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186–187.) Appellant contends, and the Attorney General agrees, the following errors in the Juvenile Detention Disposition Reports should be corrected.

On the report dated December 17, 2010, in section D, the "x" under "Disposition Level" should be removed from the column indicating that a charge under Penal Code section 286, subdivision (c) was disposed of as a felony; also in section D, the report should reflect that September 7, 2010, is the correct date on which count 2 was sustained and count 1 was not sustained.[16]

On the report dated February 28, 2011, in section D, the "x's" under "File Level" and "Disposition Level," indicating the probation violation was designated a misdemeanor, should be removed.

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[16] We agree with the Attorney General no dismissal code is needed because count 1 was not dismissed.

On the report dated May 30, 2014, in section D, the "x's" under "File Level" and "Disposition Level," indicating the probation violation was designated a misdemeanor, should be removed. "[A]n allegation under section 777 of a probation violation not amounting to a crime cannot, as a matter of law, lead to a finding that a criminal offense has been committed. This is so even if the underlying conduct is a crime." (*In re M.B.* (2009) 174 Cal.App.4th 1472, 1477.)

DISPOSITION

The court is directed to correct the Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities to show appellant has 916 days in secure custody. The court is directed to correct the Juvenile Detention Disposition Reports for December 17, 2010, February 28, 2011, and May 30, 2014, as indicated in this opinion. In all other respects, the judgment is affirmed.

_____
Dondero, J.

We concur:

_____
Humes, P. J.

_____
Margulies, J.